Ten informal rules for AUKUS success

As the US government prepares to implement the National Defense Authorization Act's AUKUS provisions, Kevin Wolf and Fred Shaheen offer insights on how it can be made a success, drawn from their experience with past defence trade treaties and the export control reform process. They emphasise the importance of keeping it simple by adhering to 'informal rules' while remembering AUKUS's underlying purpose.

As much work that went into the creation of the National Defense Authorization Act's AUKUS provisions, the arguably more challenging part – implementation – now stands before the US administration. The AUKUS provisions contain multiple requirements to ensure that the AUKUS partnership policy objectives will be timely and effectively implemented. These include the creation of senior advisors, a task force, revised control lists, new interagency processes, and new regulations.

As the National Security Council, and the staffs at the departments of State and Defense, work to complete their decision-making and drafting efforts, we offer the following general rules and commentary for consideration. Our recommendations stem from our experiences during, and the lessons learned from, the efforts to implement the Australia and UK defence trade treaties and the Export Control Reform effort, each of which had similar general policy objectives.

Rule #1: The AUKUS solutions must be simpler than the existing rules.

Commentary 1: AUKUS-specific changes to US export rules (including at least the International Traffic in Arms Regulations ('ITAR'), the Foreign Military Sales ('FMS') rules, and the Export Administration Regulations ('EAR') must not result in compliance that is more complex and time-consuming than simply applying for traditional authorisations, otherwise there would be no point to the AUKUS changes. Failure to meet this fundamental goal is why the UK and Australia defence trade treaties, and the associated Open General Export Licence ('OGEL') efforts, largely failed to result in meaningful uptake.

Rule #2: When in doubt on an interpretive issue, remember that the purpose of AUKUS is to create a defence alliance among three key Allies to counter common security threats.

Comment 2: It is only realistic to expect that there will be occasions for government officials (US, UK and AUS) and industry to get mired in the details when discussing AUKUS implementation and compliance issues. However, the world is a very different and more challenging national security environment than in the days when the UK and Australia treaties were discussed. For that reason, when any regulatory issue is in doubt or being debated, all should reflect on the need to tilt in favour of reducing defence trade regulatory burdens among the three AUKUS signatories to address common security issues.

Rule #3: To effect rule #1, the ITAR (for Direct Commercial Sales), the Foreign Military Sales rules (including Letters of Acceptance), the EAR, and any other US regulatory requirements must be seamless in their approach to AUKUS.

Commentary 3: If patchworks of overlapping and inconsistent approvals under different regulatory and internal (e.g., think LOCLO) systems are necessary to implement the AUKUS vision, then the effort will stall and ultimately fail. An AUKUS nation's exemption should be a single mechanism with the broadest possible coverage for exports to the UK and Australia.

Rule #4: We all love the sound of the term 'Expedited Processing,' but history tells us that it is largely meaningless because it is subjective and rarely predictable, or truly faster. In all cases permissible by law, 'instantly approved' with follow-on reporting is consistent with AUKUS objectives and should be the default unless otherwise necessary.

Commentary 4: 'Expedited processing' is essentially meaningless and too often the off-ramp solution to having to make tough decisions (see Rule #2). An AUKUS 'instantly approved' concept is necessary to ensure that, e.g., 'real time' collaboration among AUKUS company engineers within the scope of the AUKUS objectives is authorised without the need for reviewing multiple authorisations for scope or seeking new authorisations. The authorisations must allow for intra-AUKUS technology, software, and commodity transfers (and associated record keeping) at the speed of business and R&D. (The

'permissible by law' reference primarily pertains to the limitations on transfers of Missile Technology Control Regime Category 1 items that will still require some form of authorisation, albeit 'expedited'.)

Rule #5: The standard for an AUKUS company to be a member of the 'approved community' must be rapid and leverage existing procedures so that bona fide companies can quickly meet uniform criteria.
Comment 5: If reasonable standards for becoming an 'approved community' member are not clearly and uniformly articulated, (a) within the US interagency; and (b) then to the aerospace and defence industries in all three signatory countries, then those that are members will not be able to trade with their supply chains under AUKUS exemptions. They will simply need to use legacy authorisations because some of their subsidiaries, suppliers, and partners are not in the community. Leveraging existing screening procedures, such as those associated with having been identified on a prior export authorisation, should be the approach the three governments mutually adopt. And, when adopting a rule, don't let the perfect be the enemy of the good. (We were actually thinking of making *that* a rule unto itself, but enough said.)

Rule #6: Important US, UK, and AUS programmes are not always exclusively limited to companies within the geography of those countries.
Comment 6: The proverbial elephant in the room is supply chain, and herein lies a key challenge for the drafters. Any AUKUS solutions should have programme carve-outs to allow for vendors/suppliers in other Allied countries to plug into the AUKUS carve-outs. During the treaty discussions, this issue was discussed during preparations for the Directorate of Defense Trade Controls OGELs and early thinking about how items 'leaving the AUKUS bubble' can be compliantly onward managed, such as with a General Correspondence for Direct Commercial Sales items. Without addressing the allied supply chain, AUKUS implementation will quickly grind to a halt.

The changes must not result in compliance that is more complex and time-consuming than simply applying for traditional authorisations, otherwise there would be no point to them. Failure to meet this fundamental goal is why the UK and Australia defence trade treaties largely failed to result in meaningful uptake.

Rule #7: When the State Department considers whether AUS and UK have 'comparable' export control systems, keep in mind that that does not mean they need to have systems that are 'identical' to those of the US.
Comment 7: The ITAR has proven itself incapable of dealing with fundamental security relationships with our close allies. This is why it took legislative changes to get to an AUKUS arrangement. To have a comparable system, Australia and the UK do not need to have the same rules as the US. The drafters should think boldly and imaginatively when looking at the robustness of the UK and Australian export regimes particularly in light of recent improvements to both.

Rule #8: Any exempted technology list must be as simple and short as possible.
Comment 8: Any list must only be of the items needed to protect truly sensitive items that should not be shared even with close allies. As a drafting matter, the default might be to leverage the exempt technologies lists from the treaties. It is important for the technical experts to start fresh and re-evaluate all technologies in an AUKUS context, keeping Rule #2 in mind. This recommended approach will be particularly important as the signatories move out on AUKUS Pillar II technologies.

Rule #9: Because all ITAR, FMS, EAR and any other applicable US regulatory changes must ultimately be understood and implemented by US, UK, and AUS industry and compliance practitioners, the governments should engage with industry early and often when developing the new exemption.
Comment 9: Congressional authors certainly understood this approach and with the leadership demonstrated by the Aerospace Industries Association and individual companies, that input was ongoing and made for better law overall. These industry interactions would help to shape a final draft, which is set up for success and learns the lessons of past attempts. (Continued outreach to key congressional staff and members will be equally important.) For example, a requirement that significantly detracted from the usefulness of the treaties was the marking requirements on items shared under them. The governments did not anticipate how harmful this requirement would be to the treaties' objectives, but could have had they engaged in earlier industry outreach.

Rule #10: A fear of 'getting US export controls wrong' remains strong. This potential psychological barrier to interoperability (and thus 'buying American') should be front of mind as part of driving towards effective AUKUS implementation.
Comment 10: Perceptions of burden, real or imagined, have the same chilling effect as actual regulatory burdens. If the three governments can come up with a solution that industry can use (see Rule #1), positive attitudes toward AUKUS should follow and not lead to 'here we go again' reactions developed about the treaties that all such efforts will ultimately sputter and fail. It is an easy trap into which any of us could fall. We must not because this one is too important to our common security interests.

Kevin Wolf is a partner in the international trade group of the law firm Akin Gump. He was the Assistant Secretary of Commerce for Export Administration during both terms of the Obama administration.

Fred Shaheen is a trade controls attorney. He was a Navy submarine officer who served in the Reagan and Bush I administrations and in private practice as head of the trade controls practice at Greenberg Traurig, and later as trade controls Chief Counsel at Boeing.